

**California Victim Compensation and Government Claims Board
Report Regarding Rule 649.56, Involvement in the Qualifying Crime of
Prostitution
December 12, 2013**

Background

At the May 16, 2013, Board Meeting, the Board requested that staff conduct a review of California Code of Regulations Rule 649.56, Involvement in the Qualifying Crime of Prostitution. This request was subsequent to the Board action amending Rule 649.56 by excluding victims of human trafficking from "involvement."

Rule 649.56 states:

"(a) Involvement in the events leading to the qualifying crime of prostitution by the victim or derivative victim may be found if the victim or derivative victim was:

- (1) Engaged in activity related to prostitution; and
- (2) The crime occurred as a direct result of the activity related to prostitution.

(b) Activity related to prostitution includes, but is not limited to the following:

- (1) soliciting or participating in the solicitation of an act of prostitution;
- (2) purchasing or participating in the purchase of an act of prostitution;
- (3) engaging in an act of prostitution;
- (4) pimping as defined in Penal Code section 266h;
- (5) pandering as defined in Penal Code section 266i.

(c) For the purpose of this section, prostitution has the same meaning as defined in Penal Code section 647(b).

(d) This section shall not be applied to cases involving human trafficking pursuant to Penal Code section 236.1."

The general rule that an application from a victim of crime may be denied, in whole or in part, because of involvement in the events leading to the qualifying crime, is long standing with the compensation program and is codified in Rule 649.52. In December of 1999, the Board promulgated specific rules regarding involvement in the events leading to the qualifying crime. These new rules included actions such as mutual combat (Rule 649.53), illegal drug-related activity (Rule 649.54), gang involvement (Rule 649.55) and prostitution (Rule 649.56). The general rule remained and these additional specific rules have been in effect for nearly 14 years. In an agenda item to the Board in October of 1999, staff commented that, "the proposed regulation is consistent with the Board's current practice."

Over the years, a limited number of applications have been denied pursuant to Rule 649.56. In fiscal year 2011/12, the Board denied 28 applications based on Rule 649.56. In fiscal year 2010/11, the Board denied 23 applications based on Rule 649.56.

During the summer of 2013, staff held multiple public meetings seeking stakeholder input regarding Rule 649.56. Victim advocates, law enforcement, mental health providers, and others were invited to attend or call into any of these meetings. We also invited written comment from the public. Over 20 people, as individuals and representatives of groups, commented on the rule.

Public Comment

The American Civil Liberties Union (ACLU) filed a petition for the repeal of Rule 649.56 on October 8, 2013. The main point in the petition was that the rule is inconsistent and in conflict with existing statute and other regulations in its application. The Petition is included as an attachment to this memorandum.

Alameda District Attorney Nancy O'Malley attended one of the public meetings and requested that Rule 649.56 be at least amended and possibly eliminated. She noted, "our laws around sexual assault have changed pretty dramatically in the last couple of years." The District Attorney believes that the proper analysis regarding involvement in prostitution should look at the level of involvement. She suggested that sexual assault should not preclude a victim from benefits under the rule but that perhaps robbery should. She also added that 99 percent of underage prostitutes are taking orders or are under the control of a human trafficker and often this is not noted in the police report.

Santa Clara District Attorney Jeff Rosen wrote that "it is probably a good thing to remove prostitution from the list" of acts that may exclude an applicant from benefits. Sutter County District Attorney Carl Adams wrote that "it is very important to protect victims of human trafficking in all its forms... The addition of subdivision (d) is the right attitude but does not cover the issue..." The rule as it stands may "exclude from the exception victims... because of issues of identity of the human trafficking offender."

Alameda County Assistant District Attorney Ken Ryken spoke at a public meeting and stated in part, "From a district attorney's perspective, a lot of these young women and men are truly victims of the crime; there's no other way to say it. To treat them as other than a victim I think would do a disservice and would not be what we should aspire to, either the Board or as a population as a whole. We deal with a lot of these kids... and they truly need that type of assistance. Many are runaways or have been lured away from home, they're underage, they are really in need of service and of guidance and if we could offer them VCP benefits, I think that is the preferable route."

Santa Barbara County District Attorney's Office Victim-Witness Assistance Program Director, Megan Rheinschild, supported amending Rule 649.56 to include special consideration for minor victims. She also mentioned the difficulty many young victims of human trafficking have in cooperating with law enforcement. Many minors refuse to name offenders out of fear. This request and comment was echoed by several mental health providers who serve victims of crime.

Ellen Yin-Wycoff, Associate Director of the California Coalition Against Sexual Assault, wrote that the coalition is "in strong support of eliminating Regulation 649.56... We urge

the Board to change or eliminate this regulation that has denied victim's compensation to sex industry workers who have been sexually assaulted."

Maxine Doogan, an "Erotica Service Provider," submitted a petition with 292 signatures on it that supports the elimination of Rule 649.56. Ms. Doogan believes the rule is discriminatory because it precludes those who are working as prostitutes from receiving benefits when they are victims of rape and other crimes.

Carol Lee from the Bay Area Sex Worker Advocacy Network testified at a hearing saying, "the regulation is sending a shocking and wrong message to the public that people can treat sex workers or those who they perceive as sex workers, as badly as they please and the resulting injuries won't be addressed."

Rachel West from the United States Prostitutes Collective urged the Board to eliminate Rule 649.56 because the rule "institutionalizes the prejudice that sex workers can't be raped, that rape is not as serious for sex workers as it is for other women...it blames the victims for the violence perpetrated against them." She added, "every woman who has been raped is a victim of a violent and extremely traumatic crime and should be entitled to compensation."

Kimberly Horiuchi, an attorney for the ACLU, testified that Rule 649.56 relies heavily on the police report to determine facts. She argued that this is not reliable because the police can be biased and people lie to the police to avoid prosecution. Ms. Horiuchi also noted that a police report may not include nuances such as the victim was not actually engaged in the act of prostitution when the crime occurred. Yet the program may deny the crime victim simply because she or he is labeled as a prostitute.

Many other sex workers, mental health providers, rape victims, and advocates testified at our hearings. Most speakers echoed what has been noted previously. The common theme was the feeling that Rule 649.56 was discriminatory and out of date. Shannon Williams, who works with the Sex Workers Outreach Project summed up the general opinion of the group when she said, "...the whole idea around 'no means no' is that no matter what has happened up until the point when a woman says no, no means no. And so it shouldn't matter why I was in that room with that person; when I said no, that became rape when he continued to (have sex) with me."

During the informal public meetings and with the written submissions, staff did not receive any comments or letters supporting Rule 649.56 remaining in effect without change.

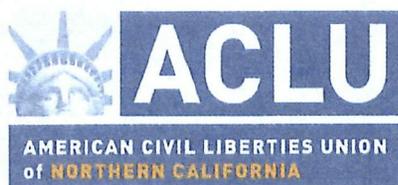
Action Options

The Board has at least four actions it may consider at this time.

1. Make no change to Rule 649.56.
2. Amend Rule 649.56 so it does not prohibit compensation for victims of sexual assault who were engaged in an act of prostitution at the time of the assault. In other words, involvement in prostitution would still be a disqualifying act for a claimant unless she or he is a victim of sexual assault.
3. Amend Rule 649.56 to only refer to pimping and pandering. The rule can be re-written so that involvement in prostitution does not prohibit compensation, only involvement in the crimes of pimping and pandering would be specifically mentioned in Rule 649.56.
4. Eliminate Rule 649.56.

If the Board chooses to amend or eliminate Rule 649.56, it will need to direct staff to begin the formal rulemaking process that will include a public comment period and approval from the Office of Administrative Law.

ATTACHMENT 1



October 8, 2013

Sent via U.S. Mail & Electronic Mail

Wayne Strumpfer, Chief Counsel
California Victims Compensation &
Government Claims Board
P.O. Box 42
Sacramento, CA 95812-3035
wayne.strumpfer@vcgcb.ca.gov

RE: Petition for Repeal of 2 C.C.R. 649.56 (involvement of qualifying crime of prostitution) pursuant to Government Code section 11340.6

Dear Mr. Strumpfer:

The ACLU of Northern California (hereinafter "ACLU-NC") requests repeal of 2 California Code of Regulation 649.56 (hereinafter "Regulation 649.56") pursuant to Government Code section 11340.6 on the grounds that the regulation is inconsistent and in conflict with existing statute and other regulations.

The purpose of the California Victim's Compensation Program ("Cal VCP" or "Board") is to "assist residents in the State of California in obtaining compensation for the pecuniary losses they suffer as a direct result of criminal acts." Cal. Gov't Code § 13950(a) (West 2013). The Board has statutory authority to promulgate regulations "reasonably necessary to effectuate the purpose of the statute," but "no regulation adopted is valid or effective unless consistent and not in conflict with the statute." Cal. Gov't Code §§ 11342.2 and 13920 (West 2013). The statute sets forth criteria for eligibility, and specifies that an applicant may be denied compensation due to participation in the underlying crime and/or involvement in the events leading to the underlying crime. Cal. Gov't Code §§ 13956(a) and (c) (West 2013).

Because the "Board has no power to adopt a regulation in conflict with or which alters or violates a statute," any such conflicting regulation must be declared void. Graham v. State Bd. of Control, 33 Cal. App. 4th 253, 261 (1995) (declaring void a Board regulation that put the burden of proof on the applicant to show that his or her actions did not contribute to his injuries since the statute provided only that the applicant must prove that the injury occurred); Gregory v. State Bd. of Control, 73 Cal. App. 4th 584, 594 (1999) (declaring void a Board regulation giving law enforcement agencies the discretion to submit summary reports in lieu of full crime reports, where the statute clearly required law enforcement agencies to provide the Board with complete

MICHELLE A. WELSH, CHAIRPERSON | DENNIS McNALLY, AJAY KRISHNAN, FARAH BRELVI, ALLEN ASCH, VICE CHAIRPERSONS | KENNETH J. SUGARMAN, SECRETARY/TREASURER
ABDI SOLTANI, EXECUTIVE DIRECTOR | CHERI BRYANT, DEVELOPMENT DIRECTOR | SHAYNA GELENDER, ORGANIZING & COMMUNITY ENGAGEMENT DIRECTOR
REBECCA FARMER, COMMUNICATIONS DIRECTOR | ALAN SCHLOSSER, LEGAL DIRECTOR | PHYLLIDA BURLINGAME, ALLEN HOPPER, NATASHA MINSKER, NICOLE A. OZER, POLICY DIRECTORS
FRANCISCO LOBACO, LEGISLATIVE DIRECTOR | VALERIE SMALL NAVARRO, SENIOR LEGISLATIVE ADVOCATE | TIFFANY MOK, LEGISLATIVE ADVOCATE | STEPHEN V. BOMSE, GENERAL COUNSEL

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

39 DRUMM STREET, SAN FRANCISCO, CA 94111 | T/415.621.2493 | F/415.255.1478 | TTY/415.863.7832 | WWW.ACLUNC.ORG



crime reports). Gregory v. State Board of Control also held that “[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down, such regulations.” Id. Regulation 649.56 is inconsistent and in conflict with existing statute and other regulations, and therefore must be repealed.

Regulation 649.56 is Facially Inconsistent and in Conflict with Existing Statute and Other Regulations.

According to the statute, in order to qualify for compensation a victim must have sustained either physical or emotional injury as a direct result of the crime. Cal. Gov’t Code § 13955(f) and (g) (West 2013). Cal VCP regulations provide that a “qualifying crime” for which a victim may be eligible for compensation is a crime that resulted in injury or death to the victim. 2 C.C.R. § 649(17) (West 2013). Regulation 649.56 provides that if a person requesting compensation is determined to be involved in the events leading up to the “qualifying crime of prostitution,” or that the crime occurred as a direct result of the act of prostitution, the request may be denied. 2 C.C.R. § 649.56(a)(2) (West 2013).

Regulation 649.56 is invalid on its face because it improperly conflates the crime of prostitution with a “qualifying crime” from which a victim has sustained an injury and may be eligible for compensation. Prostitution does not inherently include injury-causing crimes such as assault, battery, and rape. And even if an act of prostitution preceded an injury-causing crime, it would not be the crime from which the injury directly resulted. Instead it would be the crime, such as rape, or assault, that would be the injury-causing, and therefore qualifying, crime for which a person was eligible for compensation. Moreover, the confusing nature of Regulation 649.56 seems to indicate that even if the injury did not occur during the act of prostitution, the victim will still be denied simply because of his or her deemed involvement in prostitution generally.

The illogical nature of the regulation is further demonstrated by the regulation’s references to prostitution as the qualifying crime, and to the crime which may have resulted from activity related to prostitution. If prostitution could properly be considered a qualifying crime, then the term “prostitution” could be substituted in the place of “crime,” and the regulation would illogically read that involvement in the qualifying crime of prostitution may be found if the victim was engaged in activity related to prostitution and the “prostitution [crime] occurred as a direct result of the activity related to prostitution.” Hence, Regulation 649.56 is void as inconsistent with the statute and other Board regulations and must be repealed. Cal. Gov’t Code § 11342.2 (West 2013); Gregory, 73 Cal. App. 4th at 594.

Regulation 649.56 is in Conflict with the Statute in its Application.

In addition to its facial inconsistency, Regulation 649.56 acts as a per se bar to compensation which is in conflict with the plain meaning of existing statute. Although the regulation does not contain express language that participation in activities relating to prostitution constitute an outright bar, its construction and application act to do just that.

First, there is already a standalone regulation that expressly provides that a victim's involvement in events leading to the qualifying crime may serve as grounds for denial of compensation and lists factors that may be considered in determining such involvement. 2 C.C.R. § 649.52 (West 2013). The only conceivable reason why activities relating to prostitution specifically, would be included in a separate regulation, is that the Board wanted to signal that participation in prostitution was meant to serve as an outright bar to compensation. Otherwise, participation in prostitution, like any other crime, would be included in the more general regulation pertaining to the victim's involvement in the events leading up to the qualifying crime.

Second, recent Board action with respect to the human trafficking amendment to Regulation 649.56 indicates that the Board considers participation in activities related to prostitution to be an automatic bar. In its Initial Statement of Reasons for the amendment, the Board explains that such carve-out is necessary because otherwise the regulation would be "discriminating against human trafficking victims, which the Board strongly contends that these individuals should be eligible to apply to Cal VCP and potentially receive compensation for crimes committed against them." Initial Statement of Reasons for Title 2, § 649.56 subsection (d) at 2. Such sentiment indicates that the Board does not believe persons otherwise covered by 649.56 (i.e., those determined to have been involved in activities related to prostitution) are eligible to apply for compensation nor that they should be entitled to receive compensation for crimes committed against them.

Finally, the apparent practice of denying claims based solely on a citation to regulation 649.56, without any further analysis, explanation, or reference to the statute or other supporting regulation, as evidenced by past victims' denial letters, indicates that 649.56 is used as an automatic bar to compensation.

Such a per se bar is overbroad, inconsistent, and in conflict with the statute which provides only that an application shall be denied if the victim "knowingly and willingly participated in the commission of the crime that resulted in the pecuniary loss for which compensation is being sought. . .", and that "an application for compensation may be denied . . . if the board finds that denial is appropriate because of the nature of the victim's . . . involvement in the events leading up to the crime." Cal. Gov't Code § 13956(a) (West 2013); Cal. Gov't Code § 13956(c) (West 2013).

There is nothing in statute that states participation in an activity related to prostitution shall serve as an automatic bar to compensation. A regulation providing for as much is therefore void as inconsistent with the enacting statute. Cal. Gov't Code § 11342.2 (West 2013).

This per se bar is also inconsistent with the statutory carve-outs that prevent victims of sexual assault from being denied access to compensation. Cal. Government Code section 13956, subdivision (a) states that compensation may be denied to a victim who "knowingly and willingly participated in the commission of the crime that resulted in the pecuniary loss for which compensation is being sought." Cal. Gov't Code § 13956(a) (West 2013). However, amendments enacted in 2002 clarified that while participation in the crime that caused the injury may act as a formal bar to compensation, this section shall not act a bar where the injury resulted

from rape, spousal rape, statutory rape, or domestic violence.¹ Cal. Gov't Code § 13956(a) (West 2013); Stats. 2002, c. 630 (S.B. 1867), § 1.

The plain meaning of Government Code section 13956 is readily apparent. Where the plain language of the statute is clear, no further construction is needed. Gregory v. State Board of Control, Cal. App. 4th 584, 593 (1999). The purpose of the provisions added in 2002 was to ensure that victims of sexual assault are not outright denied compensation. The per se bar implicit in Regulation 649.56 – a regulation adopted in 1999, three years before the amendments adopted by SB 1867 in 2002 – is inconsistent with the plain language of the statute, which is designed to ensure that victims of sexual assault are eligible for compensation regardless of their participation or involvement in a crime.

Conclusion

Regulation 649.56 is inconsistent and in conflict with existing state statute and other regulations, both on its face and as applied. Any regulation that is inconsistent, or in conflict with statute must be stricken. Morris v. Williams, 67 Cal. 2d 733, 748 (1967); Cal. Gov't Code § 11342.2. Additionally, Regulation 649.56 sends the wrong message in that it presupposes that persons working in the sex trade deserve to be victimized. Simply because someone works in the sex trade does not mean that they are undeserving of compensation as a victim of rape or assault. This type of attitude is akin to saying that a rape victim should not receive compensation because of how she is dressed or how much she had to drink. This is discriminatory policy and not congruent with the statutory mission of Cal VCP. Therefore, pursuant to Government Code section 11340.6, ACLU-NC requests that the Board repeal this regulation.

Sincerely,



Kimberly A. Horiuchi
Criminal Justice & Drug Policy Attorney

¹ Cal. Gov't Code § 13956(a) states, "An application shall be denied if the board find that the victim or, where compensation is sought by or on behalf of a derivative victim, either the victim or derivative victim, knowingly and willingly participated in the commission of the crime that resulted in the pecuniary loss for which compensation is being sought pursuant to this chapter. However, this subdivision *shall not* apply if the injury or death occurred as a direct result of a crime committed in violation of Section 261 [rape], 262 [spousal rape], or 273.5 [battery by a spouse or cohabitant], or a crime of unlawful sexual intercourse with a minor committed in violation of subdivision (d) of the Section 261.5 of the Penal Code [unlawful sexual intercourse between a person over 21 and a person under 16.] (Emphasis added.)